

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. ZIMMERMAN

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STATE OF NEBRASKA, APPELLEE,
V.
MICHAEL D. ZIMMERMAN, APPELLANT.

Filed August 7, 2012. No. A-11-1086.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge.
Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE, Judge, and CHEUVRONT, District Judge, Retired.
MOORE, Judge.

INTRODUCTION

Michael D. Zimmerman appeals from an order of the district court for Douglas County, which denied his motion for postconviction relief without an evidentiary hearing. Because we find that the records in this case affirmatively show that Zimmerman is entitled to no relief, we affirm.

BACKGROUND

After pleading guilty to one count of first degree sexual assault on a child and one count of kidnapping, the district court sentenced Zimmerman to imprisonment for 55 to 70 years for the sexual assault conviction and to a concurrent sentence of imprisonment of 1 to 20 years for the kidnapping conviction. Zimmerman was represented by an attorney from the public defender's office during his plea hearing and by a different attorney during his sentencing hearing. On direct appeal, Zimmerman was represented by a third attorney, and he has, yet again, a different attorney on his appeal from the dismissal of his postconviction action.

Because we previously described the background relating to Zimmerman's conviction and sentencing on direct appeal, we quote a portion of that description here. On direct appeal, we stated:

On July 17, 2008, Zimmerman pled guilty to first degree sexual assault on a child and kidnapping. At the plea hearing, the State recited the factual basis, which, as summarized, reveals that on January 31, 2008, Zimmerman offered the 10-year-old victim, T.N., a ride in his vehicle as she was walking to school. When T.N. declined the offer, Zimmerman forced her into the vehicle by threat. Zimmerman took T.N. to his home where he sexually assaulted her by penetrating her vagina with his penis and tongue. After making the necessary inquiries, the district court found beyond a reasonable doubt that Zimmerman understood the nature of the charges against him to which he pled guilty, as well as the possible sentences, and that the pleas were made freely, knowingly, voluntarily, and intelligently. The court accepted the pleas of guilty and found Zimmerman guilty of the charges. The court ordered the probation office to prepare a presentence investigation report [(PSR)] and set the sentencing hearing for October 1.

According to the [PSR], an "intake prefill packet" was thereafter sent to Zimmerman at the Douglas County Correctional Center for him to complete for the presentence investigation interview. On August 29, 2008, the probation officer went to the center to complete a presentence investigation interview with Zimmerman; however, the officer was unable to meet with Zimmerman due to a conflict at that time. The officer returned to the center on September 15 to interview Zimmerman and informed the correctional staff to have Zimmerman bring his probation paperwork with him to the meeting. Zimmerman did not bring the paperwork to the meeting and indicated that he thought this was an attorney visit. Zimmerman also indicated that his attorney had taken some of the probation paperwork with him. Upon inquiry by the probation officer, Zimmerman was unclear as to what instructions he had from his attorney and indicated that he should probably not speak with the officer until receiving further instructions from his attorney. On September 15 and 16, the probation officer attempted to contact Zimmerman's attorney but did not receive a return call from the attorney. The probation officer completed the [PSR] on September 22, indicating a "refusal to complete" the interview due to receiving no further information from Zimmerman or his attorney. The [PSR] did contain a recitation of the circumstances of the offense, a victim impact statement, and a summary of Zimmerman's biographical information and criminal history.

At the sentencing hearing held on October 1, 2008, Zimmerman's counsel requested a continuance, indicating that he had not had a chance to review the [PSR]. The hearing was continued until October 15. At this hearing, Zimmerman's counsel indicated that he had an opportunity to review the [PSR] and discuss it with Zimmerman. When asked whether counsel had any additions or corrections to the report, counsel offered some letters of support and asked that they be made part of the [PSR], which the court accepted. No other corrections or comments concerning the [PSR] were made by Zimmerman or his counsel. Zimmerman's counsel made remarks concerning sentencing

and also read a letter from Zimmerman to the court, in which Zimmerman expressed remorse for his actions.

State v. Zimmerman, No. A-08-1198, 2009 WL 1277748 at *1-2 (Neb. App. Apr. 29, 2009) (selected for posting to court Web site).

On direct appeal, Zimmerman alleged that the district court abused its discretion by rendering excessive sentences, that he was denied his right to a presentence investigation, and that he received ineffective assistance of counsel when his trial counsel failed to object at the sentencing hearing when the presentence investigation had not been completed. This court found no abuse of discretion in the sentences imposed and found Zimmerman's assignment of error about the presentence investigation to be without merit because (1) the lower court gave due consideration to the presentence investigation report (PSR), to the letters offered in support of Zimmerman which provided additional information about him, and to counsel's comments in sentencing Zimmerman; (2) the PSR, despite Zimmerman's lack of participation, contained much of the statutorily required information; (3) the record showed that Zimmerman reviewed the PSR prior to the hearing and was given the opportunity to make any corrections and did not do so; and (4) Zimmerman made no objection to the PSR during the sentencing hearing. We found the record on direct appeal insufficient to address Zimmerman's claim of ineffective assistance of counsel.

On January 20, 2010, Zimmerman filed a verified motion for postconviction relief. In his motion, Zimmerman alleged that the amended information was not served on him and the district court lacked subject matter jurisdiction because the amended information was not filed with the court; that his pleas were not made knowingly, intelligently, or voluntarily, because the record does not establish whether his pleas were to the original or amended information and the charge of first degree sexual assault on a child is not a Class IB felony; that his trial counsel was ineffective because counsel (1) did not object to the amended information, (2) misadvised him of the penalty for sexual assault on a child, and (3) counsel at the time of the sentencing hearing never discussed the PSR with him; that appellate counsel was ineffective for not raising the issue of subject matter jurisdiction, failing to raise that he was not properly advised by the trial court of the correct penalty for count I, and failing to raise that his pleas were involuntary; and that judicial misconduct occurred owing to numerous alleged errors by the trial court in accepting his pleas.

The State filed a motion to dismiss Zimmerman's postconviction motion without an evidentiary hearing, and on November 23, 2011, the district court entered an order finding that Zimmerman's claims were procedurally barred or that he failed to show prejudice. Zimmerman subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Zimmerman asserts that the district court erred by dismissing his postconviction motion without an evidentiary hearing, because Zimmerman alleged facts that, if proved, constitute ineffective assistance of counsel where counsel (1) failed to adequately explain Zimmerman's options prior to Zimmerman entering his pleas and (2) purposely caused the court to receive a PSR that inaccurately characterized Zimmerman's failure to participate.

STANDARD OF REVIEW

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. *Id.* An appellate court reviews factual findings for clear error. *State v. Lee, supra.*

ANALYSIS

Counsel's Explanation of Zimmerman's Options.

Zimmerman asserts that the district court erred by dismissing his postconviction motion without an evidentiary hearing, because Zimmerman alleged facts that, if proved, constitute ineffective assistance of counsel where counsel failed to adequately explain Zimmerman's options prior to Zimmerman's entering his pleas.

A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). If a postconviction motion alleges only conclusions of fact or law--or if the records and files in the case affirmatively show that the movant is entitled to no relief--no evidentiary hearing is required. *Id.*

In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Dunkin, supra.* In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Dunkin, supra.* The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.* A lawyer's performance is deficient if his or her performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Lee, supra.* Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *State v. Dunkin, supra.*

When a defendant pleads guilty on advice of counsel, the defendant's attorney has the duty to advise the defendant of the available options and possible consequences. *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002), *abrogated on other grounds, State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012); *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994).

Zimmerman alleged in his postconviction motion that his attorney at the time of his pleas advised him to plead guilty despite his declarations of innocence and did not properly advise Zimmerman of his options. Zimmerman argues that the record supports his allegations, because during the plea hearing, he told the court that he did not restrain the victim. Zimmerman argues

that this evidence weighs in favor of finding that his counsel ignored his defenses and failed to fully explain Zimmerman's option of challenging that element of the kidnapping charge in a trial. He further argues that it may be inferred that, had Zimmerman's first attorney adequately explained his option of challenging the charge in a trial, and had a fully informed Zimmerman truly wished to waive that right and plead guilty, he would not have spoken out during the plea hearing to tell the court that he was innocent. Zimmerman also points to the portion of the record where the district court asked Zimmerman whether his attorney had advised him of all available options in further support to his allegations. Specifically, he relies on the fact that he said he "believed" and "thought" that his attorney had discussed all available options with him and that his attorney had properly represented him, especially since his answers to other questions posed by the court were more definitive "yes" or "no" answers. He argues that this dialog lends additional credence to his allegation that his first attorney ignored his assertions of innocence and pushed him to plead guilty without fully advising him of his right to a jury trial. Zimmerman asserts that had his first attorney fully advised him of his option of pursuing a jury trial, there is a reasonable probability that he would have not pled guilty but would have pursued his option of proving the truth of his version of the incident; specifically, that he did not kidnap the victim.

In a claim for ineffective assistance of counsel, factors to be considered include the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). Self-serving declarations that he would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial. *Id.*

The record shows that Zimmerman pled guilty to the offenses for which he was charged, thereby admitting his guilt of first degree sexual assault on a child and kidnapping. The district court explained what the State would have to prove at trial for each charge, and, as noted above, when the elements of kidnapping were explained, Zimmerman stated to the court that he did not restrain the victim. At that point, the court asked Zimmerman if he understood that is what the State would have to prove if he went to trial, and Zimmerman responded, "Yes." The court asked Zimmerman if he understood that by pleading guilty, he was admitting the truth of the charge, but that a plea of not guilty denied the charge. Zimmerman again responded affirmatively. Zimmerman also wrote a letter to the court apologizing for hurting the victim, and he made admissions to the assault and kidnapping to the police when he was arrested. Zimmerman has not alleged facts raising a valid defense to the charge of kidnapping, the record contradicts his assertions, and his arguments do not address the sexual assault charge in any way.

As to Zimmerman's assertion that his counsel did not advise him of his right to a jury trial, the decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision. *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011). Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. *Id.* Zimmerman points to no such advice. Further, regardless of what advice Zimmerman received from his first attorney, the record shows that the district court advised Zimmerman that he had a right to a jury trial and a

unanimous verdict and that he would be giving up that right by pleading guilty to the charges. Zimmerman stated that he understood.

Zimmerman has not established the prejudice requirement of his ineffective assistance of counsel claim. This assignment of error is without merit.

PSR.

Zimmerman asserts that the district court erred by dismissing his postconviction motion without an evidentiary hearing, because Zimmerman alleged facts that, if proved, constitute ineffective assistance of counsel where counsel purposely caused the court to receive a PSR that inaccurately characterized Zimmerman's failure to participate.

The record reflects that the sentencing hearing was continued after Zimmerman's second counsel represented to the district court that he had not had a chance to review the PSR. At the continued hearing, Zimmerman's counsel indicated that he had an opportunity to review the PSR and discuss it with Zimmerman. When asked whether he had any additions or corrections to the report, Zimmerman's attorney offered some letters of support and asked that they be made part of the PSR, and the court accepted the letters. No other corrections or comments concerning the PSR were made by Zimmerman or his counsel. Zimmerman's counsel made remarks concerning sentencing and also read a letter from Zimmerman to the court, in which Zimmerman expressed remorse for his actions. At the conclusion of remarks from Zimmerman's counsel, the court asked Zimmerman if he had anything he wished to say. Zimmerman responded, "I'm very sorry for what I have done and what I have put the Court through myself, and I'm really deeply sorry."

Now, Zimmerman claims that counsel lied to the court when he stated that he had reviewed the PSR with him. He argues that the PSR contained the probation officer's conclusion that Zimmerman refused to participate, when in reality, Zimmerman's failure to participate resulted directly from his attorney's failure to return the probation officer's calls. Zimmerman alleges that his counsel's performance was deficient because his attorney failed to return the probation officer's calls, failed to discuss the PSR with him, and lied to the court about it. He argues that he was prejudiced because there is a reasonable probability that the court would not have sentenced Zimmerman as harshly had it not referenced a PSR making no sentencing recommendations and containing the untrue conclusion that Zimmerman refused to participate.

Zimmerman observes that a defendant has a qualified right to review his or her PSR and that the defendant may, with his or her attorney, examine the PSR subject to the court's supervision. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). However, the defendant waives that qualified right by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so. Zimmerman was given the opportunity to comment at the sentencing hearing, and his only comments were to state that he was sorry for his actions. He did not contradict his attorney's statement that he had reviewed the PSR with Zimmerman.

Zimmerman also notes that a convicted defendant, even in a noncapital case, has a due process right to inquire into an incorrect assumption by the sentencing judge, untrue information materially affecting a prospective sentence, or other misinformation which a court may use in determining what sentence will be imposed. *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). He argues that the PSR in this case contained a material untruth, that is, the statement

that Zimmerman refused to complete the investigation with the probation officer. We note that the PSR actually contains a very detailed description of the sequence of events surrounding the investigation and does not necessarily reflect badly on Zimmerman's actions. The PSR includes the fact that correctional staff did not inform Zimmerman to bring his probation paperwork to the first meeting and his attorney had some of the paperwork, that Zimmerman was unclear as to his attorney's instructions regarding the investigation, that the probation officer contacted the attorney's office and did not receive a return telephone call, and that the PSR was "turned in as a refusal to complete the Presentence Investigation" due to time restraints and no further information from the attorney.

To show prejudice, Zimmerman argues that his sentences might have been less had counsel not caused the district court to receive a PSR that characterized Zimmerman as failing to participate in the presentence investigation and not lied to the court about reviewing the PSR with Zimmerman. In support of this assertion, Zimmerman argues that his sentence for first degree sexual assault on a child was in the high range of possible sentences under Neb. Rev. Stat. § 28-105 (Reissue 2008) for a Class IB felony (sentencing range of 20 years' to life imprisonment); however, Zimmerman was actually sentenced in conjunction with Neb. Rev. Stat. § 28-319.01 (Reissue 2008), which imposes a mandatory minimum of 15 years' imprisonment and a maximum of life imprisonment for the first degree sexual assault on a child under 12 years of age, first offense.

On direct appeal, this court affirmed the sentences imposed and found that they were not excessive. Zimmerman was sentenced within statutory limits for the first degree sexual assault on a child under 12 years of age and kidnapping. He was aware of the penalty ranges when he pled guilty to the charges, and his sentences were litigated on direct appeal and affirmed. No prejudice has been shown, and Zimmerman has not stated a basis for postconviction relief. Zimmerman's assignment of error is without merit.

CONCLUSION

The district court did not err by dismissing Zimmerman's postconviction motion without an evidentiary hearing.

AFFIRMED.